

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
CONNECT AMERICA FUND)	WC Docket No. 10-90
)	
A NATIONAL BROADBAND PLAN FOR OUR FUTURE)	GN Docket No. 09-51
)	
ESTABLISHING JUST AND REASONABLE RATES FOR LOCAL EXCHANGE CARRIERS)	WC Docket No. 07-135
)	
HIGH-COST UNIVERSAL SERVICE SUPPORT)	WC Docket No. 05-337
)	
DEVELOPING AN UNIFIED INTERCARRIER COMPENSATION REGIME)	CC Docket No. 01-92
)	
FEDERAL-STATE JOINT BOARD ON UNIVERSAL SERVICE)	CC Docket No. 96-45
)	
LIFELINE AND LINK-UP)	WC Docket No. 03-109

**COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE
ON INTERCARRIER COMPENSATION ARBITRAGE ISSUES**

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SUMMARY

Intercarrier compensation arbitrage has been a thorn in the side of the communications industry for over ten years. ITTA applauds the FCC's willingness to finally solve these problems, and urges the FCC to expeditiously adopt new rules to curtail this harmful behavior. It is important for the Commission to act now to bolster the current system by taking action to affirm the obligation of VoIP providers to pay access for calls terminated on the PSTN, address phantom traffic, and reduce arbitrage enabled by illegitimate access stimulation.

Abuse of intercarrier compensation mechanisms that have been established by federal and state regulators, as well as through tariffs and interconnection agreements, is rampant throughout the country. These abusive practices are costing LECs millions of dollars annually. The failure to pay proper compensation amounts destabilizes carefully crafted compensation mechanisms, harming the financial integrity of companies and undermining the building and maintenance of broadband-capable networks. The National Broadband Plan rightfully recognized the importance of resolving these issues to meeting the Commission's broadband goals.

VoIP Traffic. Access charges apply to IP-originated traffic that terminates to the PSTN. The FCC should take this critical step by affirming that entities choosing to use the PSTN must pay for that use in the same way as others do without realizing regulatory-created advantages. There is no reason for interconnected-VoIP providers to be free of obligations that apply to others who use identical termination services provided by LECs. The Commission recognized the argument in a 2004 Notice of Proposed Rulemaking that users of the network should pay for that use on an equivalent basis. And such dissimilar treatment is blatantly anticompetitive,

which is significant given that VoIP subscriptions are now over 19 percent of voice traffic connections.

VoIP providers should pay access charges because VoIP traffic is the equivalent of TDM-based voice traffic both from a functional standpoint, as well as a customer perspective. The FCC has implicitly recognized this because it has been imposing a number of Title II-like obligations on and providing Title II-like benefits to VoIP providers.

Regardless, FCC access charge policy as well as carrier tariffs require the payment of access charges even if the FCC does not classify such traffic as telecommunications services. Access charge policy has been broadly applied to all interexchange traffic regardless of the technological nature of the traffic, absent a specific exemption. The only arguable exemption, the ESP exemption, does not apply to VoIP traffic. The ESP exemption is narrow, and was only meant to cover the connection between the ESP and its subscribers, not between the ESP and non-subscribers. And it would never be applied to a wholesale carrier's transmission of VoIP-originated traffic in any event. These limitations are recognized in Commission precedent, and should be specifically reaffirmed in this rulemaking. Furthermore, the ESP exemption has never been applied to intrastate access charges. Given these conclusions, the filed rate doctrine requires that VoIP traffic pay access for interexchange traffic that is delivered to LEC networks.

The Commission should act promptly to reaffirm the obligation of VoIP providers to make access payments. The number of carriers that had been paying access for VoIP traffic, and subsequently begun withholding payments, has been growing. The unilateral decision to stop or refuse payment of access is discouraged in the *Notice* because such behavior risks manipulation of the character of all traffic as VoIP, possibly leading to catastrophic losses of network revenues. Because VoIP is required to pay access under existing FCC rules and carrier tariffs,

the FCC's specific declaration in this rulemaking should be made applicable retroactively in accordance with FCC precedent.

Phantom Traffic. Phantom traffic practices are clear and simple access avoidance schemes that should not be condoned. Users of the network should be required to pay for its use, which will benefit all consumers who pay for services provided over those networks. ITTA supports the Commission's proposal to require carriers to include calling party information in call signaling information, regardless of whether the carrier uses SS7 or the traffic is TDM or IP-based. Such a practice is typical in the industry and does not incrementally increase costs. Such calling party information is necessary to identify the proper jurisdiction of traffic and to bill customers. Allowing for proper billing will have the benefit of restoring unfairly lost revenue to carriers that will support the build out of broadband-capable networks.

The FCC should commit to promptly resolve Section 208 complaints filed against carriers that evade phantom traffic rules. If the FCC adopts clear rules that require traffic identification, a violation would constitute a clear violation of the Commission's rules that can be promptly enforced through the complaint process. In addition, the FCC should be proactive in initiating enforcement action against chronic violators of the phantom traffic rules. As an additional enforcement mechanism, the FCC should expand the *T-Mobile Order* and allow ILECs to initiate interconnection agreements with any carrier. Such enforcement efforts will go far to eliminate cheaters and allow carriers to obtain fair compensation for use of their networks.

Access Stimulation. ITTA agrees that access stimulation is an important issue that should be addressed to prevent carriers from charging unreasonable rates for access services. A carrier that intentionally makes service arrangements that artificially inflate demand without any concomitant increase in costs in order to increase revenues, while basing rates on lower demand

data, would appear to violate the Section 201 proscription against unreasonable rates.

Notwithstanding, ITTA recommends that only measured modifications be adopted to remedy current unlawful behavior. Such additional rules should include the following.

First, a CLEC using the “rural exemption” found to be engaged in illegitimate access stimulation should be required to modify its access rates to be no higher than the BOC operating in the state where its communications provider partner is located. Even though the CLEC has cost characteristics more like a much larger local exchange carrier, it derives revenues based on the higher cost of the ILEC that actually incurs higher costs in the rural territory. Modifying the CLEC mirroring rule will correct this rating issue and address most of the abusive access stimulation activities engaged in by CLECs.

Second, the Commission’s proposal to “forbear” from the deemed lawful provisions of Section 204(a)(3) in these circumstances is inconsistent with Congressional directives and departs from historic Commission policies that have assured operational certainty for carriers. Forbearance from “deemed lawful” treatment generally would fly in the face of not only Section 204(a)(3), but also the overall deregulatory intent of the 1996 Act by seeking to impose regulations where Congress removed them. The three-part forbearance test is simply not met in this instance.

ITTA supports the FCC’s efforts to comprehensively reform universal service and intercarrier compensation. There is an urgent need, however, for the Commission to act now to address obligations of VoIP providers to pay access for calls terminated on the PSTN, and issues involving phantom traffic and illegitimate access stimulation. Creating financial stability will also better enable the Commission to define the appropriate level of intercarrier compensation that should be paid right now, so that it can better evaluate how to modify intercarrier

compensation mechanisms in the future. Such stabilization and definition will allow the Commission to meet the goals it set in the National Broadband Plan to bring broadband to all Americans.

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**COMMENTS OF THE INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE
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The Independent Telephone & Telecommunications Alliance (“ITTA”) hereby files comments with respect to the three intercarrier compensation arbitration issues the FCC raises in the *Notice* issued in the above-captioned proceedings.¹ ITTA submits that there is an urgent need for the FCC to expeditiously address issues relating to compensation for Voice Over Internet Protocol (“VoIP”), phantom, and access stimulation traffic. Adopting rules to address these urgent problems are interim steps that will provide a solid foundation for more

¹ *Connect America Fund*, WC Docket No. 10-90, et al., Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) (“*Notice*”). The *Notice* requests comments on Section XV, the three arbitration issues discussed in these comments, by April 1, 2011. 76 Fed. Reg. 11632, 11657 (Mar. 2, 2011).

comprehensive intercarrier compensation reform, and will help protect network investment in rural America.

I. INTRODUCTION

ITTA is an alliance of mid-size telephone companies which collectively serve approximately 19.5 million access lines in 44 states. ITTA members offer subscribers a broad range of high-quality wireline and wireless voice, broadband, and video services. ITTA members serve predominately rural areas with low-population densities, are governed variously by price-cap and rate-of-return regulations, and have, on average, deployed broadband to approximately 85 percent of their respective service areas. In light of its members' varied business plans and strong deployment achievements, ITTA is positioned to offer a balanced view of how to make quick interim changes to intercarrier compensation mechanisms to address what have become known as "arbitrage issues."²

A. Intercarrier Compensation is an Important Source of Revenues for Network Providers in Rural Areas that is being Undermined by Access Arbitrage Schemes.

ITTA members rely on intercarrier compensation as a critical component of the revenues necessary to build and maintain their broadband-capable networks that serve a large portion of rural America. Access stimulation, phantom traffic, and failure of VoIP providers to pay access charges constitute significant drains on the current intercarrier compensation system. Therefore, it is important for the Commission to act immediately to bolster the current system by affirming the obligation of VoIP providers to pay access for calls terminated on the PSTN, address phantom traffic, and reduce arbitrage enabled by illegitimate access stimulation (sometimes referred to as traffic pumping). Abuse of intercarrier compensation mechanisms that have been established by federal and state regulators, as well as through tariffs and interconnection

² Notice, ¶¶ 603-77.

agreements, is a significant problem throughout the country. These abusive practices have been known to exist for over ten years, and are exacting an increasingly greater toll on network providers.

The FCC estimated that the amount of VoIP calling, comprised almost entirely of cable company-delivered phone service, has increased to approximately 28 percent of residential end user subscriptions as of mid 2010.³ Vonage reported that it served 2.4 million subscribers at the end of 2010,⁴ and VocalTec, the company providing magicJack, reported it is carrying over one billion minutes each month.⁵ In addition to the rapidly growing amount of VoIP calling, the number of lawsuits filed in court, as well as before state public utility commissions, has increased drastically as local exchange carriers (“LECs”) seek recovery from access customers for voice traffic that is delivered to LEC networks for termination.⁶ Moreover, some large interexchange carriers that had previously paid access on such traffic have now begun to refuse to pay intercarrier compensation for VoIP traffic, apparently for reasons of cost containment.⁷

³ Local Competition Report: Status as of June 30, 2010, Fig. 4 (Wir. Comp. Bur., Mar. 2011) (“*2011 Local Competition Report*”).

⁴ Vonage Holdings Corp. Form 10K Report, Item 1 (filed Feb. 17, 2011).

⁵ See *Known for Free Calls, magicJack/VocalTec Now Gives Away Softswitches, App Servers and Session Border Controllers* (Feb. 18, 2011), located at <http://www.vocaltec.com/site/modules/newsItem.asp?Sid=7&Pid=55&itemID=183&NewsYear=2011> (last viewed on Apr. 1, 2011).

⁶ See, e.g., *PAETEC Communications, Inc. v. CommPartners, LLC*, Civ. No. 1:08-cv-00397, Mem. Order (D.D.C., Feb. 18, 2010), *interlocutory app. pending*, Case No. 10-8002 (D.C. Cir., filed May 13, 2010); *Sprint Communications Co. L.P. v. Iowa Telecommunications Service, Inc., d/b/a/ Iowa Telecom*, Docket No. FCU-2010-0001, Order (Iowa Util. Bd., iss. Feb. 4, 2011), *recon. denied*, Order (IA Util. Bd., iss. Mar. 25, 2011).

⁷ *Central Telephone Co. of Virginia v. Sprint Communications Co. of Virginia, Inc.*, Civ. No. 3:09-cv-720 (E.D. Va, filed Nov. 16, 2009); *Cbeyond Communications, LLC v. MCI Communications Services, Inc.*, Civ. No. 1:11-cv-00693 (N.D. Ga., filed Mar. 4, 2011).

The VoIP issue is no longer a minor one, but has reached crisis proportions affecting mid-size and smaller carriers alike, putting millions of dollars in dispute, and requiring costly litigation.

Phantom traffic has been a continuing problem for over ten years. The Congressional Research Service has reported that phantom traffic could cost carriers as much as \$2 billion annually because the originating number has either not been included in signaling information, or the number has been altered by a carrier in the chain of carriers delivering the traffic to its final destination.⁸ Billing carriers are thus prevented from jurisdictionalizing the traffic and applying the proper charge. This practice has been exacerbated as the number of transiting carriers, some of whom make money by avoiding access charges on such traffic, has increased.⁹ Phantom traffic practices are clear access avoidance schemes and are not justifiable under any rational policy scenario.

Further, the problem of illegitimate access stimulation has existed for at least four years, generating many disputes and multiple lawsuits. Verizon estimates that access stimulation costs the industry upwards of \$330 to \$440 million a year.¹⁰ Access stimulators stand access charge policy on its head because there are no increased costs that need to be recovered due to the presence of the stimulators. Instead, LECs pay communications providers to locate in their territory in order to increase revenues. And it is clear that access prices are established based on other cost and benchmarking principles that have nothing to do with the stimulated traffic.

⁸ C. Goldfarb, “Phantom Traffic” – *Problems Billing for the Termination of Telephone Calls: Issues for Congress* 1 (Cong Res. Serv., June 27, 2008).

⁹ See, e.g., *Palmerton Tel. Co. v. Global NAPS South, Inc.*, Docket No. C-2009-2093336, at 20 (Pa. Pub. Util. Comm., rel. Feb. 11, 2010) (“*Palmerton v. Global NAPS*”); *Hollis Tel., Inc., Kearsarge Tel. Co., Merrimack County Tel. Co. and Wilton Tel. Co.*, DT 08-28, Order No. 25,043, at 23 (N.H. Pub. Util. Comm., rel. Nov. 10, 2009) (“*Hollis Telephone Order*”).

¹⁰ See Letter from Donna Epps, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 1 (filed Oct. 12, 2010).

B. The FCC Should Adopt Rules As Soon As Possible to Address Arbitrage Issues.

The Commission urgently needs to rectify these abusive situations in order to restore proper levels of revenue from all service providers that benefit from the use of the public switched telephone network (“PSTN”). These practices bring the fundamental principles of intercarrier compensation into disrepute, and circumvent the FCC’s policies that underpin the current intercarrier compensation system. Although ITTA agrees that comprehensive reform of the intercarrier compensation regime is necessary, these three arbitrage issues require an immediate solution before comprehensive reform can take place. ITTA and others have recommended solutions that would reduce incentives for arbitrage and restore the rational intended operation and result of the existing rules.¹¹

Inter-carrier compensation mechanisms have been established over a number of years by Congress, and federal and state regulators, to fairly compensate network providers for the costs of originating and terminating traffic. Allowing certain parties to avoid paying their fair share of those network costs undermines this carefully crafted system, although the system admittedly is now outdated and in need of reform. Certain carriers are avoiding those payments by manipulating the system to gain economic advantages for themselves, crafting their business plans based on false economic principles.¹² Although the intercarrier compensation system is

¹¹ See, e.g., Letter from Joshua Seidemann, ITTA to Marlene H. Dortch, FCC, CC Docket No. 01-92 (filed Mar. 27, 2008).

¹² It is no argument that innovative services may only be provided if they do not have to pay access charges. Although free products may be perceived as beneficial by some subscribers, free products are not good for the subscribers of the network on which the new service is taking a free ride who must pay for the new services, even if they do not use them or want them. ITTA submits that the argument made by IP-based services that they cannot afford to pay access charges is simply balancing the checkbook on the backs of current ratepayers, an economic scenario that is irrational, unsustainable, and should therefore be rejected.

outdated, these abuses should be corrected to restore the status quo so that comprehensive reform can be undertaken in a more rational and equitable environment.

Moreover, correcting current abuses is necessary to ensure that the correct amount of intercarrier compensation is known. Crafting a complicated transition mechanism to comprehensively reform intercarrier compensation is difficult, and entails serious risks to participating carriers who must be given the opportunity to adjust to changes and replace lost revenues from any reductions in current charges. Determining what carriers are at risk and establishing a rational transition is made virtually impossible if the correct amount of current intercarrier compensation is unknown because abusers are not paying their fair share.

Adopting rules to prevent such access arbitrage is also important to universal service mandates, because access charges are one leg of the “three-legged stool” that ensures predictable and sufficient support for carriers serving high-cost areas. Network providers cannot continue to invest in rural networks if there is not a predictable mechanism for cost recovery. The National Broadband Plan recognizes that intercarrier compensation is a critical component of carriers’ ability to meet broadband availability goals.¹³ Given that abusive intercarrier compensation practices are arbitrarily eliminating revenue, or in some cases overcharging for the use of facilities, the full level of legitimate compensation is not known, making it difficult to define and implement a reasonable and manageable transition period.

¹³ Federal Communications Commission, Connecting America: The National Broadband Plan, GN Docket No. 09-51, 142 (rel. Mar. 16, 2010) (“National Broadband Plan”).

II. THE FCC SHOULD PROMPTLY ISSUE A RULING ON THE PROPER INTERCARRIER COMPENSATION OWED FOR VOIP TRAFFIC.

A. There is an Urgent Need for the FCC to Quell Existing Controversies Concerning the Application of Access Charges to VoIP Traffic.

The FCC proposes to clearly delineate the intercarrier compensation owed for VoIP traffic.¹⁴ The Commission notes that not only did the National Broadband Plan indicate that a resolution of this issue is critical,¹⁵ but also there is a growing public policy need to address ongoing controversies surrounding the issue.¹⁶ ITTA applauds the FCC's willingness to finally tackle the ongoing controversies associated with VoIP traffic and urges it to take such action as soon as possible.

A critical first step toward intercarrier compensation reform must be the affirmation that all entities choosing to use the PSTN must pay for that use in the same way without realizing regulatory-created advantages. ITTA supports the proposition that terminating access charges apply to Internet Protocol ("IP")-originated traffic that terminates to the PSTN. There is no reason for interconnected-VoIP providers to be free of obligations that apply to others who use identical termination services provided by LECs. Certainly, the Commission has not hesitated to impose "social" obligations on VoIP providers, including CALEA, E-911, and USF contributions.¹⁷

¹⁴ Notice, ¶ 612.

¹⁵ National Broadband Plan at 148.

¹⁶ Notice, ¶¶ 613-14.

¹⁷ See note 29 *infra*. What makes the situation all the more galling is that some VoIP providers charge access charges when calls are terminated to their end users, but refuse to pay when the situation is reversed. Notice, ¶ 610 & n.920; Comments of AT&T, Inc., WC Docket No. 10-60, at 2 (filed Apr. 2, 2010). There is no justification for such lopsided charging practices, and the hypocrisy needs to be terminated.

Some have argued that the FCC should not require the payment of access charges now, because fundamental reform of intercarrier compensation will drive down the level of cost-based intercarrier compensation.¹⁸ These parties also argue that current “high” access charges are not needed to compensate carriers.¹⁹ The FCC should reject these arguments for several reasons. As a threshold matter, it is bad public policy to allow companies to use the network without paying their fair share because it impedes investment incentives and is unfair to other paying subscribers. Such a position would allow certain competitors, such as cable companies, to avoid access charge payments, giving them an unfair competitive advantage over other service providers. Further, such a position condones the Wild West environment that characterizes intercarrier compensation today, and such disorderly, random policy is antithetical to the promotion of a stable economic foundation for broadband networks.

In addition, the principle that providers should pay their fair share of the costs of using broadband-capable networks must impel the Commission to order unequivocally that interconnected-VoIP providers are obligated to pay access charges in accordance with the Commission’s rules. The FCC recognized the problems when it indicated in the National Broadband Plan that the unpredictable decline in access payments can impede investment incentives to build broadband-capable networks.²⁰

¹⁸ See, e.g., *Feature Group IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g) Rule 51.701(a)(1) and Rule 69.5(b)*, WC Docket No. 07-256, 52 (filed Oct. 23, 2007) (“*Feature Group IP Petition*”); Comments of Voice on the Net Coalition, WC Docket No. 10-60, 1, 8 (filed Apr. 2, 2010).

¹⁹ *Feature Group IP Petition* at 18; Reply Comments of Sprint Nextel Corp., WC Docket No. 10-60, 10 (filed Apr. 12, 2010).

²⁰ National Broadband Plan at 142.

B. Promoting Broadband and Voice Service Delivery Requires that VoIP Traffic Provide Adequate Compensation for the Use of the PSTN.

Regardless of how VoIP traffic is classified, the Commission should order that VoIP traffic terminating on the PSTN is subject to terminating access payment obligations. In addition, all PSTN originated traffic, regardless of whether it will terminate on a time division multiplexed (“TDM”) or IP platform, should be subject to originating access charges. ITTA has taken this position previously, consistent with its overarching approach that users of the network must pay for their use.²¹ In the instant situation, however, the need for a specific Commission ruling in this regard is even more urgent.

Building and maintaining network infrastructure is expensive. Mid-size carriers and other ILECs have spent years and billions of dollars constructing state-of-the-art networks that can deliver voice and broadband services, including to rural Americans. Finding private capital from which to construct such networks depends on the receipt of reliable revenues for the use of those networks.²² Basic antitrust law endorses the principle that companies should be able to prevent free riders from gaining access to costly property rights of the company without paying suitable compensation.²³ The FCC also has recognized that carriers should pay for what they use. In *IP-Enabled Services NPRM*, the FCC highlighted the unreasonableness of allowing certain service providers to avoid paying for their use of LEC facilities based on the technology platform employed:

As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP

²¹ Comments of ITTA, WC Docket No. 05-337, *et seq.*, 15 (filed Nov. 28, 2008).

²² National Broadband Plan at 3; 18-19.

²³ See P. Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L.J. 841, 850-52 (1990) (courts should not impose duties to deal that chill incentives to invest).

network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.²⁴

Many state commissions have explicitly recognized this principle in finding that intrastate access charges are owed for delivery of VoIP traffic to local exchange networks.²⁵ VoIP traffic utilizes the PSTN in exactly the same manner as TDM-based voice traffic. The logic of these state commission decisions is unassailable, and is not different than the oft-quoted axiom that a “minute is a minute” and a “bit is a bit.” All traffic should be required to pay comparable prices when using the PSTN.

C. VoIP Traffic is Telecommunications Traffic.

1. VoIP traffic is functionally equivalent to telecommunications service.

VoIP traffic is functionally equivalent to TDM-based voice traffic because, to the end user, he or she is talking on customer equipment to a person of his or her choosing. There is no doubt that VoIP and TDM voice traffic directly compete with each other, because subscribers readily substitute one type of traffic for the other. Cable companies regularly advertise the availability of “telephone service” to their subscribers when offering bundled services including fixed VoIP calling, and have won millions of customers away from ILEC-delivered voice services to VoIP voice services.²⁶ Even so-called nomadic VoIP providers, such as Vonage, urge

²⁴ *IP-Enabled Services*, Notice of Proposed Rulemaking, WC Docket No. 04-36, FCC 04-28, ¶ 33 (2004).

²⁵ *Palmerton v. Global Naps*, at 4; *Sprint Communications v. Iowa Telecom*, at 36.

²⁶ *2011 Local Competition Report* at Fig. 2. VoIP providers routinely refer to their voice telephone services as “phone” or “telephone” services. See <http://customer.comcast.com/Pages/FAQListViewer.aspx?topic=Voice&folder=40b34f8c-a783-47fc-aad5-dabb1b1c8c8b> (last viewed Mar. 28, 2011) (“Comcast Digital Voice® service uses VoIP technology to provide you a number of enhanced new features without sacrificing any of your current phone features or the call clarity you expect.”); <http://www.magicjack.com/5/faq/> (last viewed Mar. 28, 2011) (“magicJack is an easy-to-use, portable device that allows you to use a standard telephone, corded or cordless, or even a headset/mic combination. . . .magicJack has

consumers to purchase their “telephone services” and to eliminate their land line phones.²⁷ Long gone are the days when only “techies” could install computer-based VoIP calling capabilities that lacked sufficient sound quality and other characteristics to be usable by the masses or businesses. From an end user customer’s perspective, VoIP providers today offer voice services that are fundamentally little different from those offered by traditional wireline providers.²⁸

Moreover, there is no rational policy basis for treating TDM and VoIP traffic differently for intercarrier compensation purposes. The primary difference between TDM and VoIP traffic is that VoIP traffic originates on an IP network, rather than a circuit switched network. This distinction, however, is irrelevant to a LEC terminating voice traffic. Interconnected VoIP traffic is delivered to the LEC in TDM format, indistinguishable from other voice traffic. VoIP traffic terminating on the circuit switched network uses the same network components as TDM traffic.

2. The FCC has been consistently applying a number of Title II obligations to VoIP providers.

Even the FCC has implicitly recognized that VoIP calling shares many attributes with TDM-based voice traffic, as well as the fact that customers themselves have expectations that are similar when using either voice service. In a number of rulemaking proceedings over the last

an actual dedicated telephone network along with interexchange agreements with our peer telecommunications providers”).

²⁷ http://www.vonage.com/lp/US/searchgooglevonage/howitworks.php?CMP=KNC-GOO-Brand-Brand-Exact_-_Vonage (last viewed on Mar. 28, 2011) (“VoIP (or Voice over Internet Protocol) lets you make phone calls using your high speed Internet connection instead of a phone line. Vonage converts sound into data, sends it over the Internet, and converts it back into sound at the other end. The people you talk with will never know the difference, because a VoIP call sounds just like a regular phone call.”).

²⁸ Several state commissions have concluded that VoIP traffic constitutes telecommunications services. See, e.g., *State of Maine Public Utilities Commission Investigation into Whether Providers of Time Warner "Digital Phone" Service and Comcast "Digital Phone" Service Must Obtain Certificate of Public Convenience and Necessity to Offer Telephone Service*, Docket No. 2008-421, 17-24 (Oct. 27, 2010) (“*Maine Time Warner Order*”); *Sprint v. Iowa Telecom*, at 47.

several years, the FCC has imposed Title II-like responsibilities on,²⁹ and granting Title II-like protections to,³⁰ VoIP providers. The FCC actions support the conclusion that VoIP calling should be treated the same as the telecommunications services with which they compete.

D. Regardless of the FCC's Definitional Determination, Access Charges Apply to VoIP Interexchange Traffic.

Notwithstanding whether the FCC ultimately adopts the classification of VoIP calling as “telecommunications traffic,” current access charge tariffs provide that VoIP calling is subject to access charges. Access charges were developed in the early 1980s to provide a broad mechanism for interexchange carriers and other users of the network to compensate LECs for the use of their networks in originating and terminating interexchange traffic.³¹ The FCC intended “to apply these carrier’s carrier charges to interexchange carriers, and to all resellers *and enhanced service providers*.”³² Intrastate access charges were developed under the auspices of

²⁹ See, e.g., *E911 Requirements for IP-Enabled Service Providers*, 20 FCC Rcd 10245 (2005) (“911 Order”); *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 20 FCC Rcd 14989 (2005) (“CALEA Order”); *Universal Service Contribution Methodology*, 21 FCC Rcd 7518 (2006) (“USF Order”); *IP-Enabled Services Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, 22 FCC Rcd 11275 (2007) (“Disabilities Order”); *IP-Enabled Services*, 24 FCC Rcd 6039 (2009) (“Discontinuance Order”).

³⁰ See, e.g., *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers may Obtain Interconnection under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, 22 FCC Rcd 3513 (2007) (“Time Warner Declaratory Ruling”); *Telephone Number Requirements for IP-Enabled Service Providers*, 22 FCC Rcd 19531 (2007) (“Local Number Portability Order”).

³¹ *Investigation of Access and Divestiture Related Tariffs*, 97 FCC 2d 1082, Appendix at 247 (1983) (“Access Charge Order”); *MTS and WATS Market Structure, Memorandum Opinion and Order*, CC Docket No. 78-72, 97 FCC 2d 682, ¶ 77 (1983) (“Access Charge Reconsideration Order”).

³² *Access Charge Order* at ¶ 76 (emphasis added).

various state regulatory agencies and were largely based on interstate tariffs filed with the FCC.³³ The interstate access tariffs filed with the FCC, and the intrastate access charges based upon them, have been broadly applied, so charges do not vary depending on the particular technology used by the customer. For example, interstate *and* intrastate access charges apply to mobile traffic, even though such technology was not a market factor until after access tariffs were first introduced.³⁴ Thus, the FCC's access charge rules govern all voice traffic connected to the PSTN, including IP-originated voice traffic.

1. The Enhanced Services Exemption Does not Apply to Interstate VoIP Traffic.

Some VoIP providers have argued that the “ESP exemption” applies to VoIP traffic so that no switched access charges are owed.³⁵ The ESP exemption does not apply to the traffic of a carrier that is itself not providing an information service. The ESP exemption has never properly applied to interconnected VoIP traffic. VoIP providers are not acting as “enhanced service providers,” and in routing their traffic, they utilize LEC networks in the same way as other carriers do, for the same purposes, and they receive the same benefits.

The ESP exemption was adopted as a narrow exception to the FCC's deliberately broad access charge regime. In the *Access Charge Reconsideration Order*,³⁶ the FCC decided that “enhanced service providers” may use LEC facilities to originate and terminate interstate data transmissions, but should not be required to pay interstate access charges, known as the “ESP

³³ Each state tariff contains its own rates and terms for access services based on particular state regulations and factual circumstances. Tariffs that have been approved or deemed approved have the effect of law, and generally only may be challenged prospectively.

³⁴ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 1034, 1043 (1996) (“*First Interconnection Order*”).

³⁵ *Feature Group IP Petition* at 3.

³⁶ *Access Charge Reconsideration Order* at ¶ 83.

exemption”.³⁷ Effectively, this exemption made it possible for ESPs (and subsequently, Internet service providers) to purchase services from incumbent LECs as if they were end-user business customers.³⁸ This exemption plainly was intended to cover only the connection between the ESP and its subscribers, not between the ESP and non-subscribers.

In upholding the FCC’s original exemption, the Eighth Circuit highlighted the cornerstone of the decision: ESPs “do not utilize LEC services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges.”³⁹ While two types of service providers “use the LEC network services and facilities that might be ‘technologically identical,’” the Eighth Circuit held that the ESP exemption was not unreasonably discriminatory, because “the services and facilities provided by the LEC are ‘distinct’ if the carriers are making different uses of them.”⁴⁰

The FCC’s application of the ESP exemption to pulver.com’s Free World Dialup (“FWD”) is further evidence that the FCC has only applied the exemption to services that are altogether different from IP-to-PSTN services.⁴¹ There the FCC found that FWD and similar peer-to-peer services do not use LEC facilities in the same way as IP-to-PSTN or traditional

³⁷ Enhanced services are a subset of information services. *E.g.*, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Comms. Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 11230, ¶ 103 (1996). For purposes of this analysis, the distinctions between enhanced services and other information services is irrelevant.

³⁸ *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 345 (1997), *pet. for rev. denied*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) (“*Access Charge Reform Order*”).

³⁹ *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

⁴⁰ *Id.* at 542. *See also id.* at 544 (noting the exemption applies to “ISPs that . . . utilize the local networks differently” than carriers).

⁴¹ *Petition for Declaratory Ruling that Pulver.com’s Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004).

voice services, because FWD (1) requires a broadband connection at both ends (rather than contact the PSTN on either end of the call) and (2) does not provide any “transmission” service. Notably, FWD users cannot make calls to telephones on the PSTN.

In fact, when VoIP providers are sending VoIP traffic to the PSTN, they are providing wholesale telecommunications services, even though the service they provide to the originating end user may be an enhanced service. The FCC recognized this fact in affirming the wholesale telecommunications provider’s status as such when it sought interconnection agreements with other ILECs for the exchange of VoIP traffic.⁴² The traffic that the wholesale carrier transmits to the PSTN looks and costs exactly the same as TDM-based traffic, and the wholesale carrier is holding itself out as a common carrier, just as it does when it transmits TDM-based traffic. Indeed, state commissions have drawn the same conclusion in cases presented to them for decision.⁴³

The FCC never intended that the ESP exemption extend to IP-to-PSTN voice services.⁴⁴ Indeed, it would be wholly inconsistent with the full history of the ESP exemption to stretch it to encompass such voice services. Interconnected VoIP services are substitutes for more traditional

⁴² *Time Warner Declaratory Ruling*, ¶¶ 11, 15.

⁴³ *Palmerton v. Global Naps*, at 2-3; *Sprint v. Iowa Telecom*, at 34; *Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Tariffs of Blue Ridge Tel. Co., Citizens Telephone Co., Plant Telephone Co., and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global Naps, Inc.*, Docket No. 21905-U, Document No. 121910, at 8-9 (Ga. Pub. Util. Comm., Jul. 29, 2009).

⁴⁴ Even if the ESP exemption applied to interstate traffic, no state has ever imposed such an exemption from the application of intrastate access charges on VoIP traffic. Various state public utility regulatory agencies have reiterated this conclusion. *See, e.g., Palmerton v. Global NAPS*, at 7-14; *Pacific Bell v. Global NAPS*, 2009 Cal. PUC LEXIS 16, slip op. at 18 (“the exemption applies only to the ESP itself, not to the carrier of ESP traffic”); *Level 3 Commun’s, LLC*, Docket No. 04-L3CT-1046-ARB, 2005 WL 562645, at ¶¶ 217-23 (Kan. S.C.C.) (Arbitrator’s Decision) (ESP Exemption applies only to ESPs, and not the carriers that provide interexchange service to ESPs); *Hollis Telephone Order* at 14.

LEC services. Interconnected VoIP providers use the PSTN in the same way, and for the same purpose, as any other service provider delivering traffic over the PSTN. The FCC, therefore, should confirm that the ESP exemption does not apply to such traffic.⁴⁵

2. The Filed Rate Doctrine Requires Access Charge Payments for Interexchange Traffic.

Under the filed rate doctrine, a tariff filed with a regulatory agency forms the “exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff.”⁴⁶ The filed rate doctrine extends to all the terms in the tariff, not just the terms that specifically set rates.⁴⁷ Courts and state regulatory agencies must enforce the terms in a tariff because they “are the law, and not mere contracts.”⁴⁸ Customers are charged with notice of the rates and terms set out in a filed tariff, and may not bring an action against a carrier that would invalidate, alter or add to the terms of the filed tariff.⁴⁹ The filed rate doctrine bars all claims – state and federal – that attempt to challenge the terms of a tariff that a federal

⁴⁵ This very finding has been made by a number of state commissions. *See, e.g., Palmerton Tel. Co. v. Global NAPS*, at 23; *Pacific Bell Tel. of Cal. v. Global Naps of Cal.*, Case No. 07-11-018, 2008 Cal. PUC LEXIS 410, slip op. at 18-19 (Cal. Pub. Util. Comm., Nov. 19, 2007), *reh. denied*, 2009 Cal. PUC LEXIS 16 (“*Pacific Bell v. Global NAPS*”) (“the exemption applies only to the ESP itself, not to the carrier of ESP traffic”); *Level 3 Commun’s, LLC*, Docket No. 04-L3CT-1046-ARB, 2005 Kan. PUC LEXIS 166, at ¶¶ 217-23 (Kan. S.C.C.) (Arbitrator’s Decision) (ESP Exemption applies only to ESPs, and not the carriers that provide interexchange service to ESPs), *interconnection agreement and settlement approved*, 2005 Kan. PUC LEXIS 496 (Kans. Corp. Comm., Apr. 21, 2005); *Hollis Telephone Order* at 23.

⁴⁶ *Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1170 (9th Cir. 2002) (quoting *AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 230-31 (1998)).

⁴⁷ *AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. at 223-24.

⁴⁸ *Bryan v. Bellsouth Commun’s., Inc.*, 377 F.3d 424, 429 (4th Cir. 2004), *cert. denied*, 543 U.S. 1187 (2005) (quoting *MCI Telecommun’s Corp. v. Garden State Investment Corp.*, 981 F.2d 385, 387 (8th Cir. 1992)).

⁴⁹ *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000) (citing *AT&T v. Central Office Tel.*, 524 U.S. at 222, 227).

agency has allowed to take effect.⁵⁰ The filed rate doctrine applies to state tariffs as well.⁵¹

Carrier tariffs, at both the federal and state levels, apply access charges to traffic exchanged on the network, regardless of type. Nothing in these tariffs limits their application to “telecommunications traffic”. Thus, the filed rate doctrine compels the conclusion that tariffed charges are applicable to VoIP traffic.⁵²

E. The FCC Should Explicitly Condemn Unilateral Measures that Avoid Payment of Intercarrier Compensation for VoIP Traffic.

The Commission should act quickly to confirm that access payments for VoIP traffic should be required. As indicated previously, the number of carriers that had been paying access for VoIP traffic, and have now begun withholding payments notwithstanding, have been growing. While the unilateral decision to stop paying access charges is discouraged in the *Notice*,⁵³ the Commission should reiterate its prior holdings that carriers have the right to terminate their carrier customers for non-payment of these charges, as the Commission has affirmed on a number of occasions.⁵⁴

Absent a specific ruling on compensation owed for VoIP traffic, the possibility exists that carriers sending traffic to or from the PSTN will self-declare *all* of their traffic to be VoIP, thereby avoiding the payment of *any* access charges. The terminating LEC has a very difficult time identifying the nature of traffic delivered to it, and indeed VoIP traffic often looks identical to other voice traffic. This selective obfuscation of the facts by carriers could render

⁵⁰ *Evanns v. AT&T Corp.*, 229 F.3d at 840-841

⁵¹ *E.g., District of Columbia v. District of Columbia Public Service Commission*, 905 A.2d 249, 255 (D.C. Ct. App. 2006); *Porr v. NYNEX Corp.*, 230 A.D.2d 564, 570-71, 660 N.Y.S.2d 440 (App. Div. 2d Dep’t 1997).

⁵² Although the FCC exempted certain enhanced services traffic from the payment of access charges, as indicated above, this exemption does not apply to VoIP traffic.

⁵³ *Notice*, ¶ 614.

⁵⁴ *See, e.g., Ferber v. Sprint Corp.*, 13 FCC Rcd 150, ¶ 20 (Com. Car. Bur., 1997).

meaningless any intercarrier compensation transition process the Commission may establish. Carriers would face not only decreased revenues but also debilitating losses if traffic providers could disclaim the actual nature of their calls terminated to LEC networks, thereby avoiding access charge responsibility.

F. Existing Jurisdictional Charges Should Apply to VoIP Traffic on a Retroactive Basis.

Given the foregoing discussion, the FCC should not hesitate to affirm that such a policy applies to both current and past traffic through the terms of tariffed offers or interconnection contracts.⁵⁵ Some large carriers continue to pay access charges with respect to VoIP traffic, even though other large carriers have recently begun to withhold access payments on such traffic, reversing their own established practices. Some of these latter carriers have been forced by either courts or state regulatory agencies to pay access on VoIP traffic.⁵⁶ These rulings are often appealed, and they do not quell the ongoing controversies. It would be plainly anticompetitive to allow some carriers to avoid past access payments, while others have rightfully been paying. The only competitively neutral policy is to make the requested ruling continue to apply on a retroactive basis. In addition, a non-retroactive finding would disadvantage LECs, and favor interexchange carriers and VoIP providers, a situation that would undermine the very network providers that are making broadband services accessible to residential users, including in rural areas.

⁵⁵ Consistent with existing FCC policies, the rating of the call should continue to be based on an end-to-end basis in accordance with the physical location of the calling and called parties. *See* 47 U.S.C. § 153(22); *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion & Order, 19 FCC Rcd 22404, ¶¶ 17-18 (2004), *aff'd sub nom.*, *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

⁵⁶ *See, e.g., Central Telephone v. Sprint Communications; Sprint Communications v. Iowa Telecom.*

The FCC has taken the same approach in similar cases. In the *AT&T Prepaid Calling Card* case, AT&T began withholding intrastate access charges and universal service contributions on traffic from customers using its prepaid calling cards, claiming that the service was enhanced.⁵⁷ The FCC rejected AT&T's position that its prepaid calling card service was enhanced, finding that the calling cards offered nothing more than the functional equivalent of voice calling, and therefore there was no basis to treat the traffic as enhanced traffic subject to the ESP exemption.⁵⁸ The FCC held that LECs could file claims for unpaid access charges with the appropriate court or state commission,⁵⁹ and found that AT&T owed universal service obligations on a retroactive basis. The D.C. Circuit later made clear that there is a "presumption of retroactivity for adjudications" when it reversed an FCC decision to make prospective only a finding that access charges are owed with respect to menu-driven prepaid calling card traffic, which the FCC found not to be enhanced.⁶⁰

Given this clear precedent, the FCC should apply its rulings regarding VoIP traffic retroactively, consistent with other cases where parties improperly argued that traffic was not subject to access charges or other regulatory fees associated with telecommunications traffic.

⁵⁷ *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, WC Docket No. 03-133, 20 FCC Rcd 4826 (2005), *aff'd*, *AT&T v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006).

⁵⁸ *Id.* ¶¶ 14-15.

⁵⁹ *Id.*, ¶ 28 n.58.

⁶⁰ *Qwest Services Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007), *aff'g in part and rev'g in part, Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, 21 FCC Rcd 7290 (2006).

III. THE FCC SHOULD PROMPTLY ISSUE RULES THAT REQUIRE ALL CARRIERS TO ACCURATELY IDENTIFY THE ORIGINATING NUMBER ON ALL TRAFFIC.

As stated previously, phantom traffic practices are clear and simple access avoidance schemes that should not be condoned. All users of the network should be required to pay for their use.

Mid-size carriers have long called for the FCC to adopt rules to address the phantom traffic problem. In December 2005, a group of mid-sized carriers filed a comprehensive proposal to address phantom traffic.⁶¹ Subsequently, the carriers engaged in extensive discussions with other industry stakeholders, subject matter experts, and trade associations, which resulted in several modifications to the proposal. A final modified proposal was filed in March 2006,⁶² and ITTA filed an *ex parte* in support of the approach.⁶³ Similarly, the Missoula Plan endeavored to resolve the phantom traffic issue,⁶⁴ and subsequently, the National Exchange Carrier Association (“NECA”) filed a Petition for Interim Order urging the Commission to issue an interim order on call signaling requirements based on existing regulations.⁶⁵ Nearly concurrently, USTelecom filed a proposal recommending the promulgation of new rules to address phantom traffic.⁶⁶ Like prior efforts, the USTelecom filing represents a consensus

⁶¹ Letter from Karen Brinkmann to Marlene H. Dortch, FCC, CC Docket No.01-92 (filed Dec. 5, 2005) (on behalf of CenturyTel, Consolidated, FairPoint, Iowa Telecom, TDS, and Valor).

⁶² Letter from Karen Brinkmann to Marlene H. Dortch, FCC, CC Docket No. 01-92 (filed Mar. 2, 2006).

⁶³ Letter from David Zesiger, ITTA, to Marlene H. Dortch, FCC, CC Docket No. 01-92 (filed Mar. 13, 2006).

⁶⁴ See ITTA Comments, Docket Nos. 05-337, 96-45, et al (filed Nov. 26, 2008).

⁶⁵ National Exchange Carrier Association, Inc., Petition for Interim Order, CC Docket No. 01-92 (filed Jan. 22, 2008).

⁶⁶ Letter from Glenn T. Reynolds, Vice President, Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Feb. 12, 2008).

position achieved by multiple entities. ITTA believes that the USTelecom proposal represents a reasonable approach to the problem and supports its adoption by the Commission.

A. Requiring Carriers to Pass Through Originating Number Information on All Calls as Proposed in the NPRM Will Permit Proper Call Rating.

The FCC proposes to adopt a rule that requires calling party number to be transmitted in signaling information on all calls, regardless of jurisdiction.⁶⁷ The FCC requires such identifying information to be included, and not altered, whether or not SS7 is used to transmit the call, and whether or not it is originated by the customer of a VoIP provider. ITTA supports this proposal and urges the Commission to adopt it as soon as possible.

Including calling party information in call signaling information is a typical industry practice and does not incrementally increase the costs of any carrier. Such information forms the basis of records which are necessary to identify the proper jurisdiction of traffic and to bill customers. Allowing for proper billing will have the benefit of restoring unfairly lost revenue to carriers that is necessary to build out and maintain broadband-capable networks. In addition, it should make the effort of comprehensive reform more rational, permitting a proper definition of the revenues and costs associated with a transition to a new intercarrier compensation regime.

B. The FCC Should Aggressively Enforce the Phantom Traffic Rules.

The FCC should commit to promptly resolve Section 208 complaints filed against carriers that evade its phantom traffic rules.⁶⁸ The Section 208 complaint process has been criticized in the past because it can be slow and very expensive. Notwithstanding, if the FCC adopts clear rules that require traffic identification, failure to provide such information would

⁶⁷ Notice, ¶ 626.

⁶⁸ Although ITTA urges the Commission to find that VoIP services are telecommunications services subject to Section 208, if the Commission chooses not to do so, it should set up a complaint process that could be used against VoIP providers that is parallel to the “common carrier” complaint rules located at 47 C.F.R. §§ 1.711, *et seq.*

constitute a clear violation of the Commission's rules that can be promptly enforced through the complaint process. By committing its staff to the prompt resolution of phantom traffic complaints, the Commission can go far to quickly rectify phantom traffic situations.

In addition, the FCC should be proactive in initiating enforcement action against chronic violators of the phantom traffic rules. The Commission has the authority to investigate rule violators under Section 403 of the Communications Act.⁶⁹ For enforcement to have a generally deterrent effect, it must be taken swiftly, and carry a substantial fine. Aggressive enforcement actions initiated by the Commission would serve as a serious deterrent to rule violators.

As an additional enforcement mechanism, the FCC should expand the *T-Mobile Order*⁷⁰ and allow ILECs to initiate interconnection agreements with any carrier. In *T-Mobile* the FCC permitted ILECs to initiate interconnection contracts with wireless carriers in order to allow ILECs to collect reciprocal compensation due for indirect traffic delivered to ILEC networks.⁷¹ Allowing an ILEC to begin the interconnection contract negotiation process, with the threat of a state arbitration proceeding if negotiations fail, has gone a long way to regularizing the interconnection and payment process with wireless carriers, and this ruling has been useful in enforcing appropriate intercarrier compensation arrangements with wireless carriers. However, ILECs continue to be frustrated when attempting to enforce interconnection arrangements with CLECs who do not directly interconnect with an ILEC. This situation could be rectified by giving ILECs the right to initiate interconnection contracts using the procedures of Section 252

⁶⁹ 47 U.S.C. § 403. The Commission has been aggressive in its use of forfeiture authority to punish violations of Commission rules pursuant to 47 U.S.C. § 503.

⁷⁰ *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report & Order, CC Docket No. 01-92, 20 FCC Rcd 4855 (2005) ("*T-Mobile Order*").

⁷¹ *Id.*, ¶ 16.

of the Act. ITTA proposes that the FCC extend the *T-Mobile* ruling to all negotiations between local exchange carriers, including VoIP providers that are determined to be providing telecommunications services and those that are intermediaries for VoIP providers, regardless of VoIP classification.⁷²

IV. THE FCC SHOULD ADOPT TARGETED RULES TO PROTECT ACCESS CHARGE CUSTOMERS FROM PAYING INFLATED CHARGES CAUSED BY ACCESS STIMULATION.

The FCC indicates in the *Notice* that access stimulation creates an arbitrage situation that allows carriers to overcharge for access services.⁷³ It proposes to adopt rules that would prevent carriers from taking unfair advantage of the current access charge rules in situations where they share revenues with a partner. ITTA believes that the Commission should adopt rules to preclude overcharging for access services.

A. Access Stimulation is an Important Issue that Requires Adoption of Targeted Rules.

The FCC has previously created an extensive record concerning possible rules to address access stimulation,⁷⁴ although to date it has not taken any action. Rather, it has engaged in some limited enforcement action against specific parties found to be engaging in illegitimate access stimulation.⁷⁵ ITTA maintains that access stimulation should be expeditiously addressed by the Commission. A carrier that intentionally makes service arrangements that artificially inflate

⁷² Although broadband providers are not “local exchange carriers”, the FCC’s policies have permitted interconnection contracts when the VoIP provider, who is using a broadband provider as the network over which VoIP calling is routed, delivers traffic indirectly to a local exchange carrier. *See Time Warner Declaratory Ruling*, ¶ 9.

⁷³ *Notice*, ¶¶ 636-37.

⁷⁴ *See Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, 22 FCC Rcd 17989 (2007) (“*Access Stimulation NPRM*”).

⁷⁵ *See, e.g., Qwest Commns Corp. v. Farmers & Merchants Mut. Tele. Co.*, 24 FCC Rcd 14801 (2009) (“*Farmers & Merchants Second Reconsideration Order*”); *Investigation of Certain 2007 Annual Access Tariffs*, Order, WC Docket No. 07-184, 22 FCC Rcd 21261 (2007).

demand without any concomitant increase in costs in order to increase revenues, while basing rates on lower demand data, would appear to violate the Section 201 proscription against unreasonable rates.⁷⁶ The general fact patterns described in various proceedings evince compliance with tariff and access pricing regulations, yet result in earnings that have been characterized as “grossly in excess”⁷⁷ of maximum allowed rates.

B. Specific Access Stimulation Rules Should be Limited to Situations in Need of Federal Rules.

1. CLECs should be required to charge the nearest BOC access rates in rural areas when the trigger is met.

The FCC proposes that, if a trigger is met, a CLEC should be prohibited from basing its access rates on the ILEC access rates in the territory in which it is operating pursuant to the so-called “rural exemption”.⁷⁸ The “rural exemption” has been exploited by some CLECs by providing services to communications providers in rural territories for the precise aim of increasing traffic volume without cost increases. Even though the CLEC has cost characteristics more like a much larger local exchange carrier, it derives revenues based on the higher cost of the ILEC that actually incurs higher costs in the rural territory. In such a situation, the CLEC can apply noncost-based rates to a stimulated amount of traffic in order to reap supra-competitive profits. In order to avoid this situation, the CLEC found to be engaged in illegitimate access

⁷⁶ The fact that actual costs or demand differs from projections is not by itself sufficient evidence that rates are unlawful or that a carrier violated the rules. By their very nature, tariff projections are *predictions*, and actual results can and do vary. Although a variation may implicate the accuracy of *future* projections, variations do not imply per se that the original projection was either inaccurate or unlawful when made.

⁷⁷ *Access Stimulation NPRM*, ¶ 11.

⁷⁸ *Notice*, ¶ 665. The “rural exemption” provides that when a rural CLEC operates in the territory of a non-rural ILEC, it is entitled to charge NECA access rates, assuming the highest rate band for local switching. *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, ¶ 81 (2001) (“*CLEC Access Charge Reform Order*”).

stimulation should be required to modify its access rates to be no higher than the BOC operating in the state where its communications provider partner is located.

Although a number of parties have suggested different triggers, ITTA notes that a coalition of carriers has identified a proposal that “seeks to limit the number of minutes of use per line above which CLECs would not be able to take advantage of the rural benchmark” to 406 minutes of use per line per month.⁷⁹ ITTA support this effort to identify a trigger that would require a CLEC to use the lower BOC benchmark when its traffic exceeds what normally can be expected of rural ILECs. This trigger would grant substantial flexibility to a carrier operating pursuant to the “rural exemption” while protecting customers from paying excessive rates for stimulated traffic.

2. It is unlawful for the Commission to forbear from “deemed lawful” tariff treatment.

The Commission’s proposal to “forbear” from the deemed lawful provisions of Section 204(a)(3) as a general matter is inconsistent with Congressional directives and departs from historic Commission policies that have assured operational certainty for carriers. Section 10(a) of the 1996 Act enables the Commission to forbear from enforcing a regulation when the Commission finds that the regulation is “not necessary to ensure that charges, practices, classifications, or regulations . . . are just and reasonable and are not unjust or unreasonably discriminatory,” “is not necessary for the protection of consumers,” and that forbearance “is

⁷⁹ Letter from Glenn Reynolds, USTelecom, *et al.*, to Marlene H. Dortch, FCC, WC Docket No. 07-135, 4 (filed Oct. 8, 2010).

consistent with the public interest.”⁸⁰ The proposal to forbear from enforcing the “deemed lawful” provision fails to meet any of these standards.⁸¹

Forbearance from “deemed lawful” treatment as a general matter would fly in the face of not only Section 204(a)(3), but also the overall intent of the 1996 Act by seeking to impose regulations where Congress removed them. Congress undertook to *reduce* regulatory burdens on carriers when it enacted Section 204(a)(3) of the 1996 Act. The directive to employ streamlined tariff approvals is consistent with the general goals of the 1996 Act, which are to “promote competition and *reduce regulation . . .*” Section 204(a)(3) permits carriers to file tariffs on a streamlined basis that are “deemed lawful” when effective unless specific review is invoked.

Historically, the Commission refrained from ordering tariff refunds. The practice of “retroactive ratemaking” is prohibited generally for several reasons, including forcing carriers into a state of “constant jeopardy of being forced to refund enormous sums of money, *even though they complied scrupulously with their filed rates . . .*”⁸² Although the Commission ordered certain refunds in 1985,⁸³ Congressional directive in Section 204(a)(3) restored certainty by legislating that tariffs filed under the “streamlined” provisions of Section 204(a)(3) of the Act are “deemed lawful” if they are not suspended by the Commission for investigation prior to their effective date. This does not mean that the Commission loses oversight over tariff filings.

⁸⁰ 47 U.S.C. § 110(a).

⁸¹ There may be circumstances under which application of deemed lawful would be inconsistent with the statute, such as where a carrier filing a tariff is engaged in fraud.

⁸² See, e.g., *AT&T v. FCC*, 836 F.2d 1386, 1394 (DC Cir. 1988) (Starr, J., concurring) (finding FCC rule requiring refunds in excess of expected rate-of-return contradictory to rate-of-return regulation) (emphasis added).

⁸³ See *Authorized Rates of Return for the Interstate Services of AT&T Communications and Phase I Exchange Telephone Carriers*: Memorandum Report and Order, CC Docket No. 84-800, Phase I, 2 FCC Rcd 190, (1987) (denying deferral of automatic refund rules).

Rather, the Commission can order prospective relief. In implementing Section 204(a)(3), the Commission declared,

a streamlined tariff that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect . . . [T]ariff filings that take effect, without suspension, under section 204(a)(3) that are subsequently determined to be unlawful in a section 205 investigation or a section 208 complaint proceeding would not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness.⁸⁴

Where a tariff is subsequently found unlawful, only prospective changes may be made.

The deregulatory intent of Congress is clear in Section 204(a)(3), and the Commission found that implementation of the plain language of the statute would reduce significantly the regulatory burden associated with tariff filings:

By the 1996 Act, Congress sought to establish “a pro-competitive, deregulatory national policy framework” for the telecommunications industry. Consistent with that goal, Section 402 is intended streamline the LEC tariff filing process by truncating the period for pre-effective review of certain LEC tariffs.⁸⁵

Had Congress determined that additional regulatory oversight of tariffs was necessary, then it would have imposed appropriate requirements in the 1996 Act. The deregulatory intent of Section 204(a)(3) is clear, and the Commission should not obstruct it through a forbearance action.

There is also no evidence that forbearance from “deemed lawful” status is necessary to protect consumers. Even after tariff changes are effective, an interested party may file a

⁸⁴ *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, CC Docket No. 96-187, 12 FCC Rcd 2170, ¶¶ 19-20 (1997) (“*Streamlined Tariff Order*”).

⁸⁵ *Implementation of Section 402(b)(1) of the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, CC Docket No. 96-187, 11 FCC Rcd 11233, ¶ 5 (1996) (citations omitted). Section 402(b)(1)(A)(iii) of the 1996 Act added section 204(a)(3) to the Communications Act. *Streamlined Tariff Order*, ¶ 1.

complaint to find an effective tariff unlawful pursuant to Sections 207 (in Federal district court) or 208 (at the Commission) of the Act. The Commission may begin an investigation of existing tariff terms and conditions on its own motion and prescribe lawful terms and conditions pursuant to Section 205 of the Act. The Commission has concluded in the past that such procedures are sufficient to protect customers.⁸⁶ Although rare, the Commission has also used its Section 205 prescription power to reform carrier rates.⁸⁷

The rights of consumers are protected in the “deemed lawful” environment. “Deemed lawful” treatment enables the Commission and carriers to avoid tariff review processes for each filing. Forbearance from “deemed lawful” treatment could place LECs into “almost endlessly suspended animation”⁸⁸ by removing certainty from filed tariff rates. Meanwhile, the rights of users of tariffed services are protected: the filing of tariffs electronically enables interested parties to review tariff transmittals as they are filed.⁸⁹ And, the current structure enables the Commission to suspend tariffs where resolution cannot be found during the seven and 15 day review periods (for rate decreases and increases, respectively).

Finally, forbearance from “deemed lawful” treatment is not in the public interest. The streamlined process enables carriers to react quickly to competitive forces, reinforcing the goals of the 1996 Act. The statute is unambiguous and evinces clear Congressional intent to eliminate regulatory hurdles that would decelerate market-fueled tariff adjustments. Forbearance from

⁸⁶ *Streamlined Tariff Order* at ¶¶ 20-23, *recon. denied*, Order on Reconsideration, 17 FCC Rcd 17040, ¶ 8 (2002).

⁸⁷ *See, e.g., New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989) (carrier ordered to reduce rates in order to compensate customers for overearnings; rate reductions were referred to as “refunds,” though reductions would accrue to a different customer base than that which had contributed to the overearnings).

⁸⁸ *See ACS of Anchorage, Inc., v. FCC*, 290 F.3d 403, 413 (D.C. Cir. 2002).

⁸⁹ *See, e.g., Streamlined Tariff Order* at ¶ 47 (ordering electronic filing).

“deemed lawful” treatment would rip meaning from the statute; it would not simply *suspend* regulation, but would have the opposite effect of *imposing* regulation where Congress has reduced it. Moreover, there are other safeguards at the Commission’s disposal other than forbearance that it can use to address unlawful rates.

ILECs are already heavily regulated. They must file voluminous amounts of data every time they make annual tariff filings that detail their historical and projected costs, and historical and projected demand. This information is required to be filed in a Tariff Review Plan (“TRP”), some of which must be filed approximately 60 days prior to the actual tariff effective date. In addition, the Commission often asks for additional information to clarify or supplement the TRP information after the tariff is filed. Neither customers nor the Commission need additional information, over and above that already provided, to evaluate carrier rates. Such additional requirements would be burdensome and therefore should not be adopted.

In sum, forbearance from the “deemed lawful” provision in general is inherently inconsistent with the intent of the 1996 Act, the purpose of Section 204(a)(3), and would impose regulation beyond the careful balance that Congress sought to achieve through enacting changes to the tariff process.⁹⁰ The FCC should not adopt this proposal.

V. CONCLUSION

ITTA supports the FCC’s efforts to comprehensively reform universal service and intercarrier compensation. There is an urgent need, however, for the Commission to act now to address obligations of VoIP providers to pay access for calls terminated on the PSTN, and issues involving phantom traffic and illegitimate access stimulation. Addressing these limited situations in the interim will go far to stabilizing the most controversial parts of the intercarrier

⁹⁰ See Comments of the Verizon Telephone Companies, WC Docket No. 03-256 (filed Jan. 30, 2004).

compensation mechanism. This stability will also better enable the commission to define the level of intercarrier compensation that should be paid right now, so that it can better evaluate how to modify intercarrier compensation mechanisms in the future. Such stabilization and better definition will better enable the Commission to meet the goals it set in the National Broadband Plan to bring broadband to all Americans.

Respectfully submitted,

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